

September 15, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0106

Ms. Courtney T. Bingham
CTB Enterprises, LLC
2535 Highway 45 South
Jackson, TN 38301

Dear Ms. Bingham:

This is in response to the appeal that you filed on behalf of your firm, CTB Enterprises, LLC ("CTBE"). We have carefully reviewed the material from the Tennessee Department of Transportation ("TDOT") as well as the information you provided and have concluded that the denial of your firm's certification as an eligible Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial record evidence.

Your appeal is denied based upon our determination that substantial evidence supports TDOT's conclusion that your contribution of capital to acquire your ownership interest in CTBE was not real, substantial, and continuing as required by the Department's Regulation.

Your appeal is also denied based upon our determination that substantial evidence supports TDOT's conclusion that the firm is not an independent business within the meaning of the Department's Regulation.

The specific reasons for the denial of your appeal include the following:

OWNERSHIP

The Regulation at §26.69(c) provides in part, that contributions of capital or expertise by the disadvantaged owner to acquire an ownership interest in the participating DBE business be real and substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents.

According to the record evidence, you are the sole owner of CTBE, a trucking firm established in December 2003. The firm leases office space and a trailer from Tri-State Express ("Tri-State"), a trucking firm established in 1980 located at the same address as CTBE and owned by your grandfather, Mr. Harold Montgomery. (The record does not indicate whether Mr. Montgomery is a non-disadvantaged individual).

According to the record evidence, you invested \$1,000.00 of your own funds to start the business and co-signed for a line of credit with _____ with Mr. Montgomery as the co-signor to purchase the firm's trucks. You stated:

My trucks have been paid by Tri-State for hauling. But, for work done. The trucks I own, one of them, hauls and has earned money from Tri-State and has in turn paid me money for the work I did and been put into my bank account. I bought the truck and my truck has been doing work for Tri-State.

Under the Department's Regulation §26.69(e), contributions of capital or expertise by the disadvantaged owner to acquire their ownership interest in a firm must be real and substantial. In general, an owner incurring personal liability to acquire his or her share in the business is not considered real, substantial, and continuing within the meaning of the Department's Regulation. Although your contribution of \$1,000.00 and line of credit is a factor in determining whether you meet the requirements of the Regulation, this does not appear substantial given the value of at least one truck is over \$100,000.00. Thus substantial evidence supports TDOT's conclusion that your contribution of capital to acquire your ownership in CTBE was not real, substantial, and continuing as required by the Department's Regulation.

In your May 12, 2004, rebuttal letter you stated:

The major problem I have with the letter and reason for denial is that I feel as if I am being discriminated against because of my grandfather and the fact that he owns Tri-State.

In reference to the letter, yes, I do own two trucks. Yes, Harold Montgomery co-signed the loans for those trucks. I am a twenty-three year old woman. I do not know of any financial institution that would have given me a line of credit on my own to make these purchases. These trucks are leased to Tri-State; therefore there are Tri-State logos on the trucks. . . . It states in the lease for my trucks that Tri-State will be responsible for the driver's payroll and license plates with CTBE listed as the lessee. It also mentioned in the letter about the furniture in my offices. It clearly states in the lease agreement between CTBE and Tri-State that the office furniture is included in the terms of the lease

The Department considered your rebuttal; unfortunately substantial evidence supports TDOT's decision.

INDEPENDENCE

According to the Regulation at §26.61(b), the firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

The Regulation at §26.71(b), provides that only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its

relationship with another firm or firms. In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm. You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm. In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

TDOT determined that CTBE is dependent upon Tri-State for equipment and financing. During TDOT's on-site interview, you indicated that your firm's logos were not on the firm's trucks since they are leased to Tri-State Express. You also indicated that the firm's trucks are licensed under Tri-State but that you are planning to transfer licensing over to CTBE.

According to the site visit report, you stated that the office equipment used by CTBE is owned by Tri-State and CTBE, but "mostly [owned by] Tri-State." Lastly, when asked who is employing the two drivers for the trucks, you responded that they are "paid through Tri-State as part of my trucks working through them – I assisted in picking them." In its DBE certification denial letter, TDOT determined that:

the correlation between CTBE and Tri-State are intertwined in such a way that this office cannot distinguish between the two companies. Mrs. Courtney Bingham, . . . has relied on her grandfather, Mr. Harold Montgomery, much too heavily for assistance in getting her business started. . . . It is the opinion of this office that CTBE is not able to operate the company without the continued assistance of Tri-State in receiving loans and getting work.

You make the following points in your May 12, 2004 rebuttal letter:

1. CTBE leases office space from Harold Montgomery, who owns the property where both Tri-State and CTBE have offices.
2. The firm's trucks are leased to Tri-State which is why they use Tri-State logos. The lease agreement states that Tri-state is responsible for the driver's payroll and license plates with CTBE listed as the lessee.
3. The lease agreement between CTBE and Tri-State states that the office furniture is included in the terms of the lease.

Under the Department's Regulation, the applicant firm bears the burden of demonstrating its independence from other firms. In this instance, there seems to be virtually no differentiation between CTBE and Tri-State in its trucking operations. There also appears to be a strong pattern of exclusive and primary dealings with Tri-State, a factor in determining a firm's independence. In addition, CTBE appears to rely heavily on Tri-State for financing the firm's equipment and hiring of employees. Although you alleged in your rebuttal letter that many of these facts are

contained in the firms' lease agreement, it does not appear that CTBE can act independently from Tri-State, which in effect controls most of the firm's operations and equipment usage. Thus, TDOT's conclusion that CTBE is not an independent business is supported by substantial record evidence.

You state in your rebuttal letter:

The final paragraph stating reason for denial lists the most disturbing causes; they cannot distinguish between Tri-State and CTBE, I have relied on my grandfather too heavily for assistance, I would not be able to operate without the continued assistance of Tri-State Express. The first time I worked for my grandfather at a trucking company was when I was in junior high. I went back to work for him in 1996, my sophomore year of high school and have worked for him since except for the months previously mentioned. The trucking business is all that I know. My duties have ranged from answering phones, to accounts payable and receivable, payroll, managing bank accounts, dispatching drivers, fuel taxes, assisting customers and other truckers, and maintaining office supplies and equipment. In what other ways does one get started in a business of his or her own without a mentor, and in most cases someone to help financially. This will probably be my only opportunity to have a business of my own. That chance is very dependent upon DBE certification. I feel that if I were certified I would have opportunities that a non-certified business would not have. Also, if I get certified my grandfather is planning to retire, because he feels like then his work will be done. Thanks to my grandfather it has been my dream to have a trucking company of my own. Unfortunately, it seems that now the main thing standing in my way is him and fact that he owns Tri-State.

The Department considered your rebuttal arguments; unfortunately it is prohibited under the Department's DBE Regulation.

In summary, the information provided cumulatively supports a conclusion that CTBE does not meet the criteria as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on TDOT's Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Original Signed By

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: TDOT
U.S. Senator, Lamar Alexander